STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 12, 2003
v	No. 234923 Wayne Circuit Court
HAROLD B. SHAW, JR., Defendant-Appellant.	LC No. 00-011373

Before: Talbot, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), assault with intent to commit murder, MCL 750.83, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of natural life imprisonment for the first-degree murder conviction, life imprisonment for the assault with intent to commit murder conviction, and thirteen to twenty years' imprisonment for the first-degree home invasion conviction, to be served consecutive to a five-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm in part and remand for further proceedings.

Defendant's convictions arise from his participation in an incident in which defendant, along with codefendants Jafari Martin and Marcus Walker,[1] broke into a house to steal money. Mary Shakur, her two young children, and her teenage brother were home at the time. Shakur and her four-month-old daughter were both shot during the ordeal. Shakur died from a single gunshot to her forehead, while Shakur's daughter received a nonfatal gunshot wound in the shoulder.

I

On appeal, defendant first argues that the trial court improperly denied his motion to sever his trial from that of codefendant Martin. We disagree.

[1] Defendant was tried jointly with codefendant Martin, before a single jury. Codefendant Walker was tried separately. *People v Martin*, Docket No. 234921 and *People v Walker*, Docket No. 237773, have been submitted on appeal with this case.

Under MCR 6.121(D), the trial court's decision to grant separate trials is discretionary. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). Severance is mandatory only when "a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Id*. A defendant's failure to make this showing, "absent a significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of the joinder decision." *Id*. at 347. Inconsistent defenses are not enough to mandate severance; rather, the defenses must be mutually exclusive or irreconcilable. *Id*. at 349. The tension between the defenses "must be so great that a jury would have to believe one defendant at the expense of the other." *Id*.

In this case, severance was not mandatory because defendant did not clearly, affirmatively and fully demonstrate that his substantial rights would be prejudiced by a joint trial and that severance was the necessary means for rectifying the potential prejudice. MCR 6.121(C); *Hana, supra* at 346. We agree with the trial court's determination that the defenses were not antagonistic. The fact that both defendant and codefendant Martin claimed to act as a lookout in their respective custodial statements did not require severance.[2] A confession is not "antagonistic" for the purposes of determining whether to sever a trial where the confession of a codefendant incriminates both the codefendant and the defendant. *People v Harris*, 201 Mich App 147, 153; 505 NW2d 889 (1993). Here, Martin's statements, particularly his second custodial statement, incriminated both Martin and defendant. Moreover, any risk of prejudice was reduced by the fact that the prosecution was pursuing aiding and abetting theories against each defendant. *Hana, supra* at 360-361. Therefore, we find no abuse of discretion. Further, defendant has not shown on appeal that the requisite prejudice occurred at trial. *Id.* at 346-347.

II

Defendant next argues that reversal is required because, although the trial court sua sponte ruled that testimony given by prosecution witness David Harrison regarding statements made to him by codefendant Walker, was inadmissible, it failed to give a limiting instruction or advise the jury to disregard the testimony. Because defendant neither objected to Harrison's testimony nor requested a limiting instruction, this issue is not preserved. MRE 103(a)(1); MRE 105; *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

First, we reject the prosecution's suggestion on appeal that the disputed testimony was independently admissible under MRE 804(b)(3). An out-of-court statement within the scope of MRE 804(b)(3) is not admissible as substantive evidence unless it has sufficient indicia of reliability to satisfy Confrontation Clause concerns. *People v Poole*, 444 Mich 151, 164-165; 506 NW2d 505 (1993). Here, the prosecutor never sought to make an offer of proof at trial to establish a foundation for the evidence under this rule. MRE 103(a)(2). Indeed, we note that the

---

[2] We note that codefendant Walker was tried separately because the trial court granted Walker's motion to adjourn trial, not because of defendant's motion for separate trials.

prosecutor later objected when codefendant Martin's attorney attempted to cross-examine Harrison about what codefendant Walker had told him.

We reject defendant's claim that the trial court should have given the jury a limiting instruction that codefendant Walker's statements could not be used against him. Because the court did not admit the evidence for any purpose, a limiting instruction was neither necessary nor appropriate. The pertinent question is whether the court's failure to sua sponte instruct the jury to disregard the testimony constituted plain error. Because defense counsel may have regarded an attempted "cure" by jury instructions as "no better and perhaps worse than the injury", the court's failure to sua sponte instruct the jury to disregard the testimony did not constitute plain error. See *People v Wright*, 408 Mich 1, 30 n 13; 289 NW2d 1 (1980).

Furthermore, even if the absence of an instruction could be considered plain error, reversal would not be warranted because defendant's substantial rights were not affected. *Carines, supra* at 763-764. From our review of the record, we conclude that Harrison's brief testimony about codefendant Walker's statements did not affect the outcome of the trial. Other proofs, including Harrison's personal observations, placed defendant in the minivan outside of Shakur's home before she was killed. Further, the evidence of a concerted plan to rob or steal from Shakur's home was overwhelming. Hence, even if the jury improperly believed, despite hearing the trial court's evidentiary ruling, that it could still consider Harrison's testimony about Walker's statements, the absence of an instruction to disregard the testimony does not warrant reversal of defendant's convictions. *Carines, supra.*

III

Defendant next argues that admission of codefendant Martin's statements to the police, without a limiting instruction advising the jury that the statements could not be considered as substantive evidence against him, deprived him of a fair trial. Defendant did not request a limiting instruction at trial and, therefore, this issue is not preserved. MRE 105.

The appellate courts in this state have generally declined to impose a duty on trial courts to provide limiting instructions absent a request. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Unlike the evidence regarding codefendant Walker's statements to Harrison, the evidence concerning codefendant Martin's custodial statements do not present Confrontation Clause concerns because Martin testified at trial. See *People v Butler*, 193 Mich App 63, 66 n 1; 483 NW2d 430 (1992). In order for the evidence to be admissible as substantive evidence against defendant, however, it would still be necessary to establish a basis for allowing the evidence under the rules of evidence. In this regard, defendant's mere assertion on appeal that codefendant Martin's statements were inadmissible hearsay is insufficient to properly invoke appellate review of this issue. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

We note that the trial court, in conjunction with its pretrial decision denying defendant's motion for a separate trial, stated without objection that the custodial statements of each defendant would be admissible against the other defendant. It appears the court relied on MRE 801(d)(2)(E) (statements made in furtherance of a conspiracy) as authority for this decision. If so, the court would have erred because post-arrest statements to police officers do not further a conspiracy. *People v Trilck*, 374 Mich 118, 124; 132 NW2d 134 (1965).

Nonetheless, even if we were to find plain evidentiary error and accept defendant's claim that the trial court plainly erred by failing to sua sponte provide a limiting instruction, we would not reverse because we are not persuaded that defendant has demonstrated the requisite prejudice.[3] It is apparent that the necessity of identifying which participants entered Shakur's home and who might have acted as a lookout did not affect the jury's verdicts. Apart from Martin's statements, the evidence independently supported the jury's verdict with respect to defendant. The fact that defendant's statement differed from Martin's statements also weighs in favor of finding that any error was harmless. See *Cruz v New York*, 481 US 186, 192-194; 107 S Ct 1714; 95 L Ed 2d 162 (1987). Because defendant had an opportunity to cross-examine codefendant Martin at trial, we conclude that reversal is not warranted because defendant's substantial rights were not affected by any error. *Carines, supra* at 763-764. Codefendant Martin's statements were not decisive of the outcome of trial with respect to defendant.

IV

Defendant next requests that we remand this matter for an evidentiary hearing to determine whether his statement to Detroit Police Officer Gregory Edwards should be suppressed as the fruit of an unlawful arrest. Under MCR 7.216(A)(5) and (7), this Court has the discretionary authority to remand for additional evidence and to grant relief as the case may require.

This Court previously denied defendant's motion to remand in connection with this issue. Limiting our review of this unpreserved issue to the record, we again are not persuaded that a remand is warranted. Probable cause to arrest exists when the facts available to a police officer, at the moment of arrest, would justify a fair-minded person of average intelligence to believe that the suspected person committed a felony. *People v Richardson*, 204 Mich App 71, 78-79; 514 NW2d 503 (1994). Moreover, a defendant's illegal arrest does not require suppression of a subsequent confession per se. Suppression is required only if there exists a causal nexus between the illegal arrest and the confession. *Kelly, supra* at 634. Additionally, a custodial confession following an illegal arrest need not be suppressed if the police uncover evidence to establish probable cause before the challenged confession was given. *Id.* at 635. Here, the facts of record do not suggest that the police lacked probable cause to arrest defendant at the time he gave his statement, or that the statement was otherwise the fruit of an illegal arrest. Hence, we deny defendant's request for a remand.

V

Defendant next argues that the trial court erroneously denied his motion to suppress his statement where the police improperly ignored his request for counsel. A trial court's factual findings at a suppression hearing are reviewed for clear error, but its ultimate decision is reviewed de novo on appeal. *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999).

---

[3] Although this Court may uphold a trial court's evidentiary ruling if the right result was reached, *People v Chavies*, 234 Mich App 274, 284; 593 NW2d 655 (1999), we express no opinion regarding whether a foundation to admit codefendant Martin's statements as substantive evidence against defendant could have been established under MRE 804(b)(3).

Deference is given to the trial court's assessment of the weight of evidence and credibility of witnesses. *People v Howard,* 226 Mich App 528, 543; 575 NW2d 16 (1997).

At the evidentiary hearing, conflicting testimony was presented with regard to whether defendant requested counsel. Deferring to the trial court's determination that defendant's testimony concerning this matter was not credible, we find no clear error in the court's denial of defendant's motion. Defendant has not established any basis for disturbing the trial court's determination that he did not invoke his *Miranda*[4] right to counsel. *People v Adams,* 245 Mich App 226, 237-238; 627 NW2d 623 (2001); *Garvin, supra.*

VI

Defendant next argues that the trial court erred by failing to sua sponte instruct the jury regarding the inherent unreliability of accomplice testimony relative to the testimony of Harrison and codefendant Martin. We disagree. A cautionary instruction asking the jury to view codefendant Martin's testimony with suspicion would have constituted error requiring reversal. *People v Reed,* 453 Mich 685, 691-694; 556 NW2d 858 (1996). Further, defendant has not shown that the court's failure to sua sponte provide the cautionary instruction with regard to Harrison was plain error. *Carines, supra.*

Defendant cites no record support for his claim that the evidence established Harrison's involvement in the crimes. A party many not leave it to this Court to find factual support to sustain or reject his position. *People v Norman,* 184 Mich App 255, 260; 457 NW2d 136 (1990). Because our review of the record fails to disclose support for defendant's claim that Harrison knowingly and willingly participated or assisted in the crimes, it is not plain that a disputed accomplice instruction was appropriate. See *People v Allen,* 201 Mich App 98, 105; 505 NW2d 869 (1993). Further, even if the record could be viewed as establishing a factual issue concerning Harrison's status, failure to sua sponte give a cautionary instruction was not plain error because the case was not a closely drawn credibility contest. See *People v Perry,* 218 Mich App 520, 529-530; 554 NW2d 362 (1996), aff'd 460 Mich 55; 594 NW2d 477 (1999); see also *People v Jensen,* 162 Mich App 171, 188; 412 NW2d 681 (1987).

Furthermore, the instant case did not involve evidence of any charges being brought against Harrison or the type of favorable treatment by a prosecutor that might affect Harrison's credibility. *Reed, supra* at 693. Potential problems with Harrison's testimony were obvious from the record, namely, the existence of undisputed evidence linking Harrison to the minivan which, in turn, was linked to the crimes.

VII

Defendant next argues that the trial court erred by allowing the prosecutor to introduce Officer Edwards' pretrial testimony pursuant to MRE 804(a)(5) without requiring the prosecutor to establish due diligence in attempting to secure his presence. We agree.

---

[4] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

"The decision whether to admit evidence is within the trial court's discretion." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). This Court must decide whether the beneficiary of the preserved nonstructural error, i.e., the prosecutor, showed that the error was harmless beyond a reasonable doubt. *Carines, supra* at 774.

The due diligence standard in MCR 804(a)(5) is a constitutionally based principle, which stems from the fact that a witness' demeanor when testifying is important evidence bearing on the witness' credibility. *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998). Contrary to the trial court's apparent belief, the fact that Officer Edwards was not a res gestae witness was not relevant to determining whether the prosecutor was required to show due diligence. Nor is it relevant that the witness was a police officer, whose purpose was to give testimony about defendant's confession, or that the court previously determined that defendant's confession was voluntary. The test for due diligence is whether the prosecution made a "diligent good-faith effort in its attempt to locate a witness for trial. The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Bean, supra* at 684.

Because the trial court denied defendant's request for a hearing regarding the prosecutor's efforts to locate Officer Edwards, the court had no evidentiary basis upon which to conclude that Edwards was unavailable within the meaning of MRE 804(a)(5). Accordingly, we remand this case for a due diligence hearing consistent with *Bean, supra*. If due diligence is not found, the court shall afford defendant an opportunity to move for a new trial. We will retain jurisdiction to review the court's findings and decision on remand.

VIII

Defendant next argues that the trial court committed several instructional errors requiring reversal. We disagree. Because defendant did not object to the court's jury instructions at trial on the same grounds he now raises on appeal, this issue is unpreserved, thus limiting our review to plain error affecting defendant's substantial rights. *People v Sabin (On Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). A trial court's instructions must be reviewed in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The pertinent inquiry is whether the jury instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v McCrady*, 244 Mich App 27, 30; 624 NW2d 761 (2000).

Defendant first argues that the instruction on "reasonable doubt" was erroneous because it included the antiquated "moral certainty" language. Specifically, defendant argues that the trial court should have read the current applicable jury instruction. While we agree the trial court should have avoided using the "moral certainty" language in its instruction defining reasonable doubt, *People v Allen*, 466 Mich 86, 90 n 2; 643 NW2d 227 (2002), the use of this language does not in and of itself mandate a finding of unconstitutionality. *Victor v Nebraska*, 511 US 1; 114 S Ct 1239; 127 L Ed 2d 583 (1994). The danger with "moral certainty" language is that it might suggest that the jury could convict, in the absence of evidentiary proof, based on a moral certainty.

Here, examined as a whole, the challenged instruction begins and ends with a requirement of "proof beyond a reasonable doubt." Other instructions given by the court left no doubt that the prosecution was required to meet its burden of proof based on evidentiary proofs, rather than moral evidence. Although imperfect, the court's instructions did not invite the jury to convict defendant based on proof below that required by the Due Process Clause. *Victor, supra*. Although the court neglected to use CJI2d 3.2(3), the instruction given adequately conveyed the meaning of reasonable doubt to the jury. *People v Hubbard (After Remand),* 217 Mich App 459, 487; 552 NW2d 493 (1996). Further, it is well established that the trial courts are not required to use the Michigan Criminal Jury Instructions, which do not have the official sanction of the Michigan Supreme Court. *People v McFall*, 224 Mich App 403, 414; 569 NW2d 828 (1997).

Defendant next argues that the trial court failed to read the entire elements for larceny as set forth in jury instruction CJI2d 23.1 for purposes of the felony murder charge. We conclude that, although brief, the trial court's instructions were sufficient to fairly present the predicate larceny offense for the felony murder charge to the jury. See *People v Cain,* 238 Mich App 95, 120; 605 NW2d 28 (1999). It was not necessary that the prosecutor prove a particular value for the larceny, inasmuch as misdemeanor larceny is sufficient to support a conviction for felony murder. *People v Hawkins,* 114 Mich App 714, 717; 319 NW2d 644 (1982).

Defendant next argues that the trial court failed to give a complete instruction on the felony-firearm charge. Because the felony-firearm charge was based on defendant's actual possession of a firearm, as opposed to constructive possession, we are not persuaded that defendant has shown plain error relative to the court's instructions for this charge. *People v Burgenmeyer,* 461 Mich 431, 438-439; 606 NW2d 645 (2000). The court was not required to give CJI2d 11.34. *McFall, supra.*

Lastly, defendant argues that the trial court failed to give the mere presence jury instruction. We conclude that the trial court did not err by failing to sua sponte repeat the mere presence instruction when responding to the jury's request for a definition of aiding and abetting. It was not necessary that the court elaborate or give supplemental instructions beyond those requested by the jury. *People v Panko,* 34 Mich App 297, 301; 191 NW2d 75 (1971). Further, we note that defendant cites no record support for his claim that he pursued a mere presence theory at trial. Mere presence, as a defense theory, implies both the absence of criminal intent and passivity or nonparticipation in the actual commission of the crime. *People v Moldenhauer,* 210 Mich App 158, 160; 533 NW2d 9 (1995). As argued by defendant on appeal, conduct in serving as a lookout would not constitute mere presence. Nor does the record reflect that defense counsel argued at trial that defendant was merely present when Shakur was killed. Rather, defense counsel suggested that the jury not believe the evidence regarding defendant's statement, in which defendant claimed to be a lookout. The omitted mere presence instruction did not impair defendant's ability to present this defense. Hence, defendant has not shown plain error.

IX

Defendant's claim that he was denied his right to the effective assistance of counsel is insufficiently briefed to properly invoke appellate review. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority. *Kelly, supra* at 640-641. Therefore, we decline to address this issue. Moreover, this Court

previously denied defendant's motion to remand in connection with this issue and, from our review of the facts of record, we again are not persuaded that appellate relief is warranted. Consistent with our disposition of defendant's other issues on appeal, defendant has not established the requisite deficient performance or prejudice necessary to succeed with a claim of ineffective assistance of counsel. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Affirmed in part and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly